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No. 150

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

THE ASSOCIATED PRESS,

Petitioner,

vs.

EDWIN A. WALKER,

Respondent.

BRIEF FOR THE TRIBUNE COMPANY AS AMICUS CURIAE.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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"The newspaper is the mood of a nation, a day-to-day record of life's pattern. The historian writes of events in relation to their sequel; the newspaper keeps pace with the pitch and roll of this planet as it spins through eternity. There is little time to look back, less to look forward. Yesterday is our history, tomorrow our horizon. We catch the fleeting moment, cast it into the impatient press and, before the ink is dry, it smells of mortality."—Cross, *The People's Right to Know*, p. 3 (Columbia Univ. Press, 1953) quoting from *The Press, 1898-1948* (London, The Newspaper World, 1948).

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PRELIMINARY STATEMENT.

The Tribune Company publishes the *Chicago Tribune,* one of the nation's largest metropolitan daily and Sunday newspapers; the Tribune Company has been a member of the Associated Press since the formation of the Association. W. D. Maxwell, the Editor of the *Tribune* and the first vice president of the Tribune Company, served as one of the Association's directors for a three-year term. The Tribune Company has a long established policy and tradition of appearing, when appropriate, in litigations that threaten freedom of expression and communication. The Tribune Company last appeared in such a cause in this

Court when it filed a brief as *amicus curiae* in *New York Times Co.* v. *Sullivan,* 376 U. S. 254.[1]

The several *Walker* litigations arise out of the respondent Walker's presence and activities at the riots that occurred at the University of Mississippi in Oxford in September, 1962; the violence occurred because of the matriculation of the University's first Negro student. The crisis in Mississippi lasted several days and was an event of national concern that received front page coverage for over a week. The respondent Walker traveled from Texas to Oxford for the pre-announced purpose of attending the disturbances and violence at the campus. The Associated Press extensively reported the Mississippi riots, sending at times almost hourly dispatches to its member newspapers. The Association also transmitted dispatches concerning the respondent's involvement in the disturbances and fighting; many newspaper members of the A.P. then published such accounts as a part of their overall news coverage.[2] The respondent Walker filed fifteen libel suits in ten states, naming the Associated Press in seven suits, and its newspaper members in eleven; the aggregate damages claimed in the suits were $33,250,000.

The instant case was the first of the respondent's libel actions to be tried before a jury. The Texas courts, al-

1. The Tribune Company's interest as *amicus* in this cause is more fully detailed in the affidavit of W. D. Maxwell, Editor of the *Tribune;* the affidavit is lodged in the Clerk's Office and is reproduced in the Appendix hereto.

2. The respondent is a highly publicized ex-Major General of the Army and was an unsuccessful candidate for Governor of Texas in 1962. The dispatches of which Walker complains were written and transmitted by an A. P. reporter at the scene of the riots, while the respondent Walker was still in Oxford; Walker claims that the dispatches falsely reported that he "led a charge of students" and "assumed command of the crowd."

though expressly finding that the Associated Press was not guilty of actual malice, sustained a verdict and judgment against the Associated Press of $500,000. The Tribune Company filed its appearance in this cause as *amicus curiae* after certiorari was granted to review the judgment of the Texas Court of Civil Appeals. The Tribune Company obtained the written consent of both the petitioner and respondent to appear here.[3]

3. True copies of the letters evidencing such consent have been lodged in the Clerk's Office.

ARGUMENT.

We believe that in light of respondent's past activities and public status, it is indisputable that he is subject to the First Amendment standards enunciated in *New York Times Co.* v. *Sullivan*, 376 U. S. 254. The decisive applicability of the *New York Times* doctrine to the peculiar facts of the instant case is plain, we submit, from the nature of respondent's army career, his previous involvement in politics and controversial events, and his presence and conduct at the University of Mississippi race riots. The petitioner's brief has fully argued this proposition and to avoid repetition, we fully endorse and adopt petitioner's *New York Times* argument.

However, as *amicus curiae*, we respectfully commend and urge that this Court ground a decision of reversal on a broader base than the doctrine of "public official" or "public figure". (See *Pauling* v. *News Syndicate Co.*, 335 F. 2d 659 (2d Cir.), *cert. denied* 379 U. S. 968.) We urge the Court to recognize and hold that the First Amendment permits the reporting of current public events with impunity unless the report is both false and the product of actual malice. We think that such a holding is a necessary and logical augmentation of the First Amendment free speech and press authorities generally, and especially of the doctrine declared in *New York Times Co.* v. *Sullivan*, *supra*.

The First Amendment clearly contemplates encouragement of reporting public events, *as they happen*, even if those reports are later shown to be less than completely accurate. A nation such as ours, founded upon the concept of enlightened popular thought and opinion within the

framework of ordered liberty, must always be currently informed about the social upheavals of the day, their causes, their effects and the evils they perpetrate or seek to cure. As the Court declared in *Bridges* v. *California*, 314 U. S. 252, 268:

> "It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist."

And, in *Associated Press* v. *United States*, 326 U. S. 1, 20, the Court strongly emphasized the necessity of securing "the widest possible dissemination of information from diverse and antagonistic sources." See also *Stromberg* v. *California*, 283 U. S. 359, 369; *Whitney* v. *California*, 274 U. S. 357, 375-76 (concurring opinion); *Roth* v. *United States*, 354 U. S. 476, 484.

Moreover, in the *New York Times* case this Court specifically recognized that the First Amendment embodies "a profound national commitment to the principle that debate on *public issues* should be uninhibited, robust, and wide open. . . ." (376 U. S. at 270) (emphasis added). The Court further recognized that "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' . . ." (376 U. S. at 271-72). The *New York Times* decision also quoted and endorsed the early holding of the Kansas Supreme Court in *Coleman* v. *MacLennan*, 78 Kan. 711, 723, 98 P. 281:

> "In such a case the occasion gives rise to a privilege, qualified to this extent: any one claiming to be defamed by the communication must show actual malice or go remediless. *This privilege extends to a great variety of subjects, and includes matters of public concern*, public men, and candidates for office." (376 U. S. at 281-82) (emphasis added).

Subsequent to the *New York Times* decision, the Court declared in *Garrison* v. *Louisiana*, 379 U. S. 64, 74, that "[S]peech concerning *public affairs* is more than self-expression; it is the essence of self-government." (Emphasis added). And, in *Rosenblatt* v. *Baer*, 383 U. S. 75, 86, the Court explained and strengthened the holding of the *New York Times* case as follows:

> "There is, first, a *strong interest in debate on public issues*, and second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues."
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> "The thrust of *New York Times* is that when interests in *public discussions* are particularly strong, as they were in that case, the constitution limits the protection afforded by the law of defamation." (Emphasis added.)

Other courts, both before and after the *New York Times* case, have also clearly recognized and held that news reporting of public events and other matters of public concern are protected by the First Amendment. In *Sweeny* v. *Patterson*, 128 F. 2d 457, 458 (D. C. Cir.) Judge Edgerton so declared:

> "The protection of the public requires not merely discussion, but information . . . Errors of fact, particularly in regard to man's mental states and processes are inevitable . . . Whatever is added to the field of libel is taken from the field of free debate."[4]

So also, in *Sciandra* v. *Lynett*, 409 Pa. 595, 187 A. 2d 586, the Pennsylvania Supreme Court rejected a libel suit based on a claimed false news report of the infamous Appalachian meeting of crime syndicate overlords:

> "[T]o impose liability upon the defendant under the circumstances presented would render 'Freedom of the

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4. The *Sweeny* case was cited with approval in *New York Times*, 376 U. S. at 272.

> Press' a lie, seriously impinge upon priceless constitutional guarantees and be a substantial deprivation of the public's right to know."

Similar declarations and analogous holdings are found in *Krebiozen Research Foundation* v. *Beacon Press, Inc.*, 334 Mass. 86, 134 N. E. 2d 1, 7; *Kulesza* v. *Chicago Daily News, Inc.*, 311 Ill. App. 117, 35 N. E. 2d 517; *Tanzer* v. *Crowley Publ. Corp.*, 240 App. Div. 203, 268 N. Y. S. 620; *Hoan* v. *Journal Co.*, 238 Wis. 311, 298 N. W. 228; *Parmelee* v. *Hearst Publ. Co.*, 341 Ill. App. 339, 93 N. E. 2d 512; *Dilling* v. *Illinois Publ. Co.*, 340 Ill. App. 303, 91 N. E. 2d 635; *Broking* v. *Phoenix Newspapers, Inc.*, 76 Ariz. 334, 264 P. 2d 413; *Lulay* v. *Peoria Journal-Star, Inc.*, 34 Ill. 2d 112, 214 N. E. 2d 746.[5]

We submit that if on-the-spot news reporting of current public events is to be fostered and encouraged, as contemplated by the First Amendment, publishers and news wire services must be protected from libel actions such as those instituted by the respondent. As history has shown, the civil libel action, with its lack of criminal law safeguards and unlimited general and punitive damages, is one of the most effective weapons to suppress and silence the press and other modes of communication and expression. (See *City of Chicago* v. *Tribune Co.*, 307 Ill. 596, 607, 139 N. E. 86, 90, and the discussion thereof in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 at 277-78.)

The appended affidavit of the *Tribune's* Editor, W. D. Maxwell, attests (and common experience tells) that the riot, the demonstration, the protest and other like manifestations of social disturbance are becoming an all too common

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5. See, also, Comment, *The Scope of First Amendment Protection for Good-Faith Defamatory Error*, 75 Yale L. J. 642 (1966); Kalven, *The New York Times Case: A Note on "the Central Meaning of the First Amendment,"* 1964 Supreme Court Rev. 191; Bertelsman, *Libel and Public Men*, 52 A. B. A. Journal 657 (1966).

part of the news of the day. Mr. Maxwell's affidavit also delineates that on-the-scene reports of such sudden and violent happenings, although the best news of the event available at the time, are not always completely accurate because of the very nature of the incident covered. Strife, violence and civil disruption typically involve split-second happenings accompanied by great chaos and confusion, so that even those directly on the scene are not completely informed of the true state of events and issue reports later determined to lack complete accuracy. Indeed, it is probable that the exact truth as to many such occurrences is never completely ascertained because of the fever-pitch excitement and the invariable tendency of eye-witnesses to see and hear things differently.

Historians have recorded numerous examples of inaccurate and conflicting reports emanating from the scenes of violent or turbulent events:

The Assassination of President Lincoln. In the tumultuous aftermath of Lincoln's shooting at Ford's Theatre on the evening of April 14, 1865, wire dispatches from Washington, the situs of the tragedy, were extremely confused, contradictory and erroneous; one dispatch reported that Lincoln "with several members of his cabinet" had been assassinated. Eisenschiml, *Why Was Lincoln Murdered?*, Chap. 8, pages 65-90 (Little, Brown & Co., 1937).[6] Other news reports

6. Otto Eisenschiml concludes his exhaustive study of the assassination with the following observation (page 438):

"A great deal of new evidence must be brought to light before students can write a definite answer to many questions that confront them in their research on Lincoln's death. Facts, facts and more facts are needed and should be unearthed. In the meantime, hasty inferences are dangerous and may turn out to be unjust. Seemingly perfect nets of circumstantial evidence have at times been torn apart by a single contradictory but incontrovertible fact. Well estab-

stated that Secretary of State Sewar[illegible] Vice President Johnson had been killed along wi[illegible]oln. Still another dispatch reported that Lincol[illegible]een fired upon from the crowd as he was depar[illegible] Ford's Theatre, rather than in his loge during t[illegible] performance (*Ibid.*) (See also Lewis, *Myths After Lincoln,* pages 48-49 (Grosset & Dunlap, 1929).)

The Sinking of the Titanic. Immediately after the luxury liner *Titanic* sank, all of the New York newspapers (save for the *Times*) reported that on-the-scene observers said that all passengers on the doomed ship had survived, when in fact the vast majority perished. *American Heritage,* Vol. III, No. 1 (Dec., 1955).

The Attack on Pearl Harbor. During the week following the Japanese bombing of Pearl Harbor and Hickam Field on December 7, 1941, a plethora of false on-the-scene reports concerning the war's outbreak were widely disseminated: (1) that a task force at sea led by the Carrier *Enterprise* had been sunk by the Japanese; (2) that the Battleship *Pennsylvania* had captured two Japanese carriers and was towing them to Pearl Harbor; (3) that a large Japanese invasion fleet was rapidly approaching the northern coast of California; (4) that some Japanese advance troops had actually landed on California soil. Lord, *Day of Infamy,* pages 202-03 (Henry Holt & Co., 1957).

The Pursuit of John Dillinger, "Public Enemy No.

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lished theories have been shattered because they could not be brought into harmony with a single important new revelation, just as the discovery of radium has destroyed the belief of science in the indestructibility of the atom and changed its ideas on the transmutation of elements.

"Pending future developments, the story of Lincoln's assassination remains, in many of its phases, an unsolved mystery."

1". When F. B. I. Agents pursued the notorious John Dillinger gang to a hunting lodge near Little Bohemia, Wisconsin in April, 1934, a fierce gun battle took place; the reports to the outside world were a welter of confusion and error. The reports are well summarized in Cromie, *Dillinger—A Short and Violent Life*, page 221 (McGraw-Hill, 1962):

> "The word out of Little Bohemia was confusing, to put it politely, in the hours between the opening volley and daylight, when the Federal agents moved in and captured six machine guns, twelve shotguns, five bulletproof vests and three young women.
>
> "J. Edgar Hoover announced at 2 a.m. in Washington that Dillinger was surrounded. At 3:30 came a flash from Mercer that posses would join battle with Dillinger and his gang within a matter of hours. Shortly thereafter a third report said that Dillinger had been seen at Antigo, heading toward Chicago. Not until 6 a.m. was it admitted officially that four of the gang 'may' have broken through the cordon."

The Selma, Alabama Civil Rights Demonstrations—March, 1965. At the time of the killing of the Reverend James Reeb (who went to Selma from Boston to support Dr. Martin Luther King, Jr.'s voting crusade), the streets of Selma, according to some reports, were filled with violence and terror. Yet, one on-the-scene observer stated that, "In few cities anywhere are you as safe on the streets as you are in Selma today." (Lloyd Wendt, "Two Views of Selma—From Both Sides of 'Wall'," *Chicago's American*, Mar. 15, 1965, page 7, Col. 1.) The author of the cited article travelled to Selma to report the demonstrations first hand, and in the course of his reporting, discussed in graphic detail the difficulties of obtaining reliable information concerning the true state of events.

The above examples demonstrate that there is an unavoidable and inherent possibility of error in dispatches issued from the scenes of sudden, violent or tragic happenings. Thus, the publishing of such material exposes a newspaper or wire service to an inordinately greater risk of suit than is inherent in ordinary news reporting. And, only a moment's reflection confirms that there are few lawsuits more costly to defend than libel cases requiring the reconstruction of the true facts concerning a riot, a demonstration, a strike, an uprising or like social conflagration. Very few publishers can or will risk the reporting of such on-the-spot dispatches if plaintiffs such as Walker can later sue on the ground that events viewed in retrospect sustain a claim of libel. The expenses of litigating such claims are far too onerous for the average publisher to bear even once, let alone as a repeated expenditure.[7]

We plainly recognize that reversal of the judgment below on the ground that respondent is a public figure within *New York Times Co.* v. *Sullivan* would adequately relieve the petitioner of an unconstitutional judgment. But we submit that such a truncated holding will not encourage or protect future on-the-spot news reporting of events such as the Mississippi riots. The fortuitous circumstance that the respondent Walker is a well-known public figure will clearly not be present in many, if not most, future libel actions based upon current news reporting of riots, protests and other events of intense public concern.

Beyond cavil, if freedom from oppressive libel suits is to be contingent upon the nature and status of the plaintiff, rather that the event, the mandate of the First Amendment

7. The publisher's expenses of litigation may be multiplied many fold if the plaintiff sees fit (as the respondent Walker did here) to file not *one* but numerous libel suits in different jurisdictions predicated on the same claim of factual error. See Prosser, *Interstate Publication,* 51 Mich. L. Rev. 959 (1953).

has not been fulfilled. Accordingly, we believe that a more definitive holding is necessary to ensure that current reporting of such events as the Mississippi riots is protected and encouraged—not thwarted by the fear of suffering enormous expense and perhaps even ruin by libel suits. Reporting of such events is, we submit, best fostered within the framework of the First Amendment, consonant with the rights of all concerned, by holding that on-the-spot news reports of such events are non-actionable—although later proved false—unless they are the product of actual malice. In sum, the doctrine of public officials should encompass not only the public *figure* but also the public *event*. And, we cannot envisage a more appropriate cause for the Court to acknowledge such a doctrine than the Mississippi riots, for if the First Amendment is to have its intended vitality it certainly must protect on-the-scene news reporting of an event of such national magnitude.

CONCLUSION.

We respectfully urge that the judgment below should be reversed on the ground that the petitioner was reporting without malice a current news event of immediate and significant public interest and concern.

Respectfully submitted,

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January 6, 1967.